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Supreme Court, U.S.
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No. 91-1540

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

IN RE WAYNE SHUMA AND AMELIO GALLO, D/B/A PLAZA VENDING CO. AND PLAZA VENDING FAMILY FUN AND GAMES,

Petitioner,

vs.

K. LAWRENCE KEMP, TRUSTEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER LACK OF APPELLATE JURISDICTION MAY BE RAISED AT ANY STAGE IN THE CASE.

II. DOES A DISTRICT COURT'S DISMISSAL OF AN APPEAL FROM BANKRUPTCY COURT ON PROCEDURAL GROUNDS VEST THE CIRCUIT COURT WITH APPELLATE JURISDICTION WHERE THE BANKRUPTCY COURT ORDERS ORIGINALLY APPEALED FROM WERE INTERLOCUTORY?

III. IS GERMAIN v. CONNECTICUT MUTUAL BANK CONTROLLING OR EVEN RELEVANT?

IV. WHETHER THE DOCTRINE OF UNIQUE CIRCUMSTANCES IS APPLICABLE.

V. IS THERE ANY GROUND TO GRANT CERTIORARI?

PARTIES

In addition to the parties named in the caption of the Petition for Writ of Certiorari, it would appear that counsel for Petitioners, Allen N. Brunwasser, is also a party. The appeal before the Third Circuit at No. 91-3271 was of an Order of the District Court's Order dismissing the appeal from the Bankruptcy Court Order which removed Allen N. Brunwasser as coun-

sel for the debtor. The appeal from Bankruptcy Court to District Court specifically listed Mr. Brunwasser as a party.

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COUNTERSTATEMENT OF JURISDICTION

This court lacks jurisdiction because the orders appealed from were interlocutory, the appeals were filed late and the appeals to District Court were not properly perfected.

The appellate jurisdiction of the United States District Courts over appeals from the United States Bankruptcy Courts is conferred by 28 U.S.C. §158(d). United States Courts of Appeals are granted judicial power to hear appeals from United States District Courts by 28 U.S.C. §1291.

Respondent contends that there are two jurisdictional defects with these appeals from which the within Petition for Writ of Certiorari flows, both of which defects are fatal.

APPEAL AT NO. 91-3349

The Court of Appeals lacked appellate jurisdiction over the matters appellants sought to raise in District Court No. CA 90-135, Court of Appeals No. 91-3349, because their appeal was untimely. This is so in two respects.

The origin of this matter lies with an Order of the Bankruptcy Court on December 5, 1989. The time period for an appeal is ten days. Bankruptcy Rule 9002(a). The appeal was not filed until December 19, 1989.

The appeal was not filed until December 19, 1989, fourteen days after the Order appealed from. Thus, the District Court lacked jurisdiction, the Court of Appeals lacked jurisdiction and this Court lacks jurisdiction. Re Abdallah, 778 F.2d 75 (1st Cir. 1985), cert. denied, 476 U.S. 1116 (1986). (Note that Bankruptcy

Rule 9006(a) provides that intermediate Saturdays, Sundays and holidays are counted among the ten days.)

The second respect in which the appeal is untimely is the appeal from District Court to this Court. On May 21, 1990, the District Court entered an Order Dismissing the appeal from the Bankruptcy Court's December 5, 1989 Order because debtors failed to file a brief within the time permitted.

Instead of appealing to the Court of Appeals, on June 6, 1990, appellants filed a Motion to Revoke Order of May 21, 1990 etc. The last day on which such a Motion could be filed and be effective at extending the time for an appeal was June 5, 1990. Appellants reacted to this fatal flaw by filing a Motion for Application of Doctrine of Unique Circumstances. The

District Court denied that Motion in its Order of May 10, 1991.

The second jurisdictional defect is that the Bankruptcy Court Order appealed from is interlocutory; and, hence, the District Court lacked jurisdiction. 11 U.S.C. §158(a); Re Gracey, 80 B.R. 675 (E.D. Pa. 1987), aff'd w/o opinion, 849 F.2d 601 (3d Cir. 1988), cert. denied, 488 U.S. 880 (1989), reh. denied, 488 U.S. 950 (1989). The Court of Appeals would then, in turn, lack jurisdiction. Abdallah, Supra.

APPEAL AT NO. 91-3270

The appeal of the District Court's May 7, 1991 and November 5, 1990 Orders at C.A. 90-154 similarly has its genesis in interlocutory Bankruptcy Court Orders entered September 19, 1989, October 2, 1989 and October 13, 1989 which denied

debtors' Motion for Reconsideration. This appeal was filed October 23, 1989 with the District Court.

The September 19, 1989 Bankruptcy Court Order denied debtor's Motion to Vacate Order Appointing Trustee and Giving Authority to Employ K. Lawrence Kemp as General Counsel. This is clearly interlocutory under Gracey, Supra and Re Johns-Manville Corp., 47 B.R. 957, CCH Bankr. L. Rptr. ¶70,267 (S.D. N.Y. 1985).

The October 2, 1989 Bankruptcy Court Order denied a Motion for Rule 8011(e) Panel Review of the September 19, 1989 Order of the Bankruptcy Court.

Since there is no appellate panel in the Third Circuit, such a Motion is a nullity and did not extend or preserve the time for filing an appeal to the District Court. Furthermore, Bankruptcy Rule 8011 is designed to govern motion practice

after an appeal has been taken from the bankruptcy court.

The October 2, 1989 order denying Panel Review was not a final judgment on the matter at issue; it was merely a determination that debtors were not entitled to have a Bankruptcy Appellate Panel review what was clearly an interlocutory order.

The October 13, 1989 Order denied a Motion for Reconsideration and Investigation of Office Procedures filed by Debtor. The denial of this Motion was clearly also interlocutory. Gracey, Supra.

No. 91-3271

The appeal of the District Court's Orders of May 7, 1991 and November 5, 1990 at C.A. 90-439 similarly has its genesis in an interlocutory Bankruptcy Court Order, that of January 24, 1990. This Order

denied Debtors' Motion to Remove K. Lawrence Kemp as Trustee and Kemp and Kemp as counsel for trustee, denied Debtors' Motion to Recuse Judge Bernard Markovitz and granted Trustee's Motion to Remove Counsel for Debtors and for Disgorgement of his Fees.

These are all interlocutory matters under Gracey, Supra. A decision refusing to remove a trustee is similar to a motion to disqualify counsel which has been held to be interlocutory. Re Johns-Manville Corp., 47 B.R. 957, CCH Bankr. L. Rptr. ¶70,267 (S.D. N.Y. 1984).

CONCISE COUNTERSTATEMENT OF THE CASE

In an effort to cut through the procedural morass of this bankruptcy case, the respondent will compartmentalize the facts of each appeal in chronological

order, using the Court of Appeals case numbers.

No. 91-3270

On August 11, 1989, the Debtor filed a Motion to Vacate Order Appointing Trustee and Giving Authority to Employ K. Lawrence Kemp as General Counsel. This Motion was assigned Motion No. 89-5217M. On September 19, 1989, the Court considered the Motion in Open Court with neither the moving party nor the respondent present and denied the Motion on the merits.

On September 28, 1989, debtor filed a Motion for Rule 8011(e) Panel Review at the same Motion Number. This Motion was denied without a hearing by Order signed September 27, 1989 and docketed October 3, 1989 for the expressed reason that the Motion did not refer to an appeal and its aim would be more practically served by a

review of the transcript of the hearing of September 19, 1989.

The Debtor on October 12, 1989, filed a Motion for Reconsideration and Investigation of Office Procedures at the same Motion Number. This Motion was also denied by Order signed October 13, 1989 and Docketed on October 16, 1989.

On October 23, 1989, Debtor filed a Notice of Appeal of the Orders of September 19, 1989, October 2, 1989 and October 13, 1989. On October 24, 1989, Deputy Clerk Joyce Pinchok sent debtor's counsel a letter directing parties to file copies of documents designated as part of the record on appeal. When debtor failed to do this, the Bankruptcy Court Clerk issued a Notice of intent to Transmit Partial Record on January 5, 1990.

This appeal was then on January 25, 1990 docketed by the District Court at

C.A. 90-154 and assigned to Judge Donald E. Ziegler. On November 5, 1990, the District Court dismissed the appeal for debtor's failure to comply with Bankruptcy Rule 8009 which requires a brief to be filed within fifteen days of the docketing of the appeal.

Debtor filed a Motion for Reconsideration, Reargument, Vacation and or Amendment of the Order of November 5, 1990 and a Motion to Recall the Reference. Both Motions were denied by Orders entered May 7, 1991. Apparently, the appeal from these Orders at District Court No. C.A. 90-154 were docketed in the Court of Appeals as No. 91-3270.

No. 91-3349

On December 5, 1989, Bankruptcy Court Judge Bernard Markovitz of the United States Bankruptcy Court for the Western

District of Pennsylvania entered an Order requiring the two general partners of this partnership debtor to file statements of their personal assets and liabilities.

Debtor appealed from this December 5, 1989 Order. Although the Bankruptcy Court entered an Order requiring the Appellant to provide copies of designated documents and the Clerk sent a letter to Appellants' counsel advising him that the Clerk intended to transmit a partial record, he failed to do these things.

This appeal was docketed by the District Court at C.A. 90-135 and assigned to Judge Gustave Diamond, who, on April 17, 1990 entered an Order requiring the debtor to show cause within eleven days why its appeal should not be dismissed for failure to file a Brief as required by Bankruptcy Rule 8009. When no response was filed, Judge Diamond's Deputy Clerk sent debtor's

counsel a letter on May 4, 1990, which letter noted the lack of a response and granted debtor an additional seven days within which to respond When no response was filed, on May 21, 1990, an Order was entered dismissing the said appeal.

On June 6, 1990, debtor filed a Motion to Revoke Order of May 21, 1990. This Motion was denied by Memorandum Order dated September 25, 1990.

On October 1, 1990, debtor filed a Motion for Application of Doctrine of Unique Circumstances. Additionally, debtor filed a Motion to Recall the Reference. Both of these Motions were denied in a Memorandum Order entered May 10, 1991.

An appeal of Judge Diamond's Order of May 10, 1991 was taken to the Court of Appeals and there docketed at No. 91-3349.

On November 7, 1989, the Trustee filed a Motion to Remove Counsel for the Debtors and for Disgorgement of Fees Paid Him. This Motion was docketed by the Bankruptcy Court Clerk at Motion No. 89-7222M.

On December 4, 1989, debtor filed a Motion to Recuse Judge Bernard Markovitz, and on December 5, 1989 debtor filed a Motion to Remove the Trustee.

A hearing was held on the Trustee's Motion (No. 89-7222M) on December 5, 1989 which resulted in an Order signed that day granting said Motion.

January 24, 1990, Judge Markovitz entered an Order which (1) denied Debtors' Motion to Remove K. Lawrence Kemp as Trustee; (2) denied Debtors' Motion to Recuse Judge Bernard Markovitz; and (3) Granted

Trustee's Motion to Remove Counsel for Debtors and for Disgorgement of Fees.

Debtor reacted by filing a Motion for Reargument, Reconsideration, etc. on February 5, 1990 which was denied by Order dated February 8, 1990 and filed February 9, 1990.

Debtors filed a Notice of Appeal on February 13, 1990. Despite the fact that a letter and an Order of Court were sent to debtors' counsel telling him to provide the Bankruptcy Court Clerk with copies of all documents designated as part of the record on appeal, he failed to do so, and a partial record was transmitted to District Court where it was docketed at C.A. 90-0439 and assigned to Judge Ziegler.

This appeal was treated similarly by Judge Ziegler to the one at C.A. 90-154. On November 5, 1990, he entered an Order

of Court dismissing the appeal for failure to file a brief.

Debtors countered with their Motion for Reconsideration etc. and Motion to Recall Reference. On May 7, 1991, Judge Ziegler entered an Order denying the Motion for Reconsideration and another denying the Motion for Recall of the Reference.

SUMMARY OF ARGUMENT

Appellate jurisdiction is an ever present issue which may not be waived by the parties but may be raised at any time, even on appeal from a decision from the appellate court lacking jurisdiction. Appellate jurisdiction depends in part on the jurisdiction of the court from which appeal is taken. If the court below lacked jurisdiction, the appellate court

does not have jurisdiction to decide the merits of the appeal.

The case of Connecticut National Bank v. Germain has been decided and is irrelevant because it involved appeals of an interlocutory decision where leave had been granted to take the appeal from bankruptcy court to district court and the district court had properly certified the matter as appealable to the court of appeals. Neither of those jurisdictional prerequisites were met in this case.

None of the factors relied upon to select cases for grant of certiorari are present in this case.

ARGUMENT

I. LACK OF APPELLATE JURISDICTION MAY BE RAISED AT ANY STAGE OF THE PROCEEDINGS.

The appellate jurisdiction of an intermediate appellate court may be raised for the first time on appeal from that court's decision. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

Petitioners have argued that since respondent did not raise the appealability of the Bankruptcy Court Orders at the District Court level, it was improper for him to have done so before the Court of Appeals. They overlook the fact that their appeals to District Court were dismissed because of their own failures to perfect the appeals by filing the briefs required by the Rules. The issue of wheth-

er the District Court had jurisdiction was never reached.

Moreover, appellant jurisdiction is subject matter jurisdiction and thus may be raised for the first time at any stage, even on a later appeal.

II. APPELLATE JURISDICTION DEPENDS UPON THE SUBJECT MATTER JURISDICTION OF THE COURT FROM WHICH THE APPEAL COMES.

It is axiomatic that where the court below had no subject matter jurisdiction, an appeal of its decision can vest the appellate court with no jurisdiction. United States v. Storer Broadcasting, 351 U.S. 192 (1956); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

Where the appellant failed to meet the procedural requirements of the preceding appellate court, the higher appellate

court lacks jurisdiction. United States v. Nixon, 418 U.S. 683 (1974).

Here Petitioners' appeals to District Court were properly dismissed for their failure to file a brief. Their appeals to the Court of Appeals were dismissed for lack of appellate jurisdiction because the Bankruptcy Court Orders appealed from were interlocutory. Thus, it is clear the District Court lacked jurisdiction and the Circuit Court of Appeals accordingly lacked jurisdiction.

III. THE GERMAIN CASE HAS BEEN DECIDED AND IS IRRELEVANT.

Petitioners refer to Connecticut National Bank v. Germain, 926 F.2d 191 (2d Cir. 1991) as a case before this Court, the outcome of which will decide or determine this matter. This Court decided Germain on March 9, 1992, at No. 90-1791

in the manner Petitioners had apparently hoped; however, the Germain case is not relevant to this one.

Germain dealt with whether the Court of Appeals had jurisdiction to entertain an appeal of an interlocutory Bankruptcy Court Order from the District Court affirmance of that Order. The Court of Appeals construed 28 U.S.C. §§1292(b) and 158(d) together to reach the conclusion it lacked jurisdiction. This Court reversed and held that the Court of Appeals did have jurisdiction.

The distinguishing feature about Germain is that there, Connecticut National Bank sought and obtained leave to appeal the Bankruptcy Court's decision to the District Court and the District Court certified an interlocutory appeal under 28 U.S.C. §1292(b). See Germain, 926 F.2d at 192. Thus, both the District Court and

the Circuit Court of Appeals had appellate jurisdiction.

That is a sharp contrast to this case where Petitioners filed notices of appeal from interlocutory orders without obtaining leave from the Bankruptcy Court under 28 U.S.C. §158 (a) and Bankruptcy Rule 8003 and then filed notices of appeal from the District Court's orders to the Court of Appeals without obtaining certifications pursuant to 28 U.S.C. §1292(b) and Federal Rule of Appellant Procedure 5.

IV. THE DOCTRINE OF UNIQUE CIRCUMSTANCES IS INAPPLICABLE.

Petitioners assert they would have liked the opportunity to have an evidentiary hearing before the Court of Appeals to demonstrate the applicability of the doctrine of unique circumstances to justi-

fy or rectify thew tardiness of their appeal.

The doctrine of unique circumstances was formulated by this Court in Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). There the district court judge had assured the plaintiff in open court on the record with the defense counsel present that plaintiff's post-trial motion was presented in ample time. Defense counsel did not object. Plaintiff relied on the court's pronouncement in not filing an appeal until the district court had denied the post trial motion. When the court of appeals dismissed the appeal because the post-trial motion was filed too late to postpone the time for filing the appeal, this Court reversed to correct the unfairness apparent from the face of the record.

In the case at bar, petitioners do not point to anything Judge Diamond did or

said on or off the record. They rely on off the record ex parte alleged conversations with a member of the judge's staff.

Those few cases where unique circumstances have justified the allowance of a late appeal are based on matters of record. See, e.g. Aviation Enterprises, Inc., 716 F.2d 1403 (D.C. Cir. 1983). The practice hauling the district court's clerks in the the court of appeals to testify about off the record conversations with counsel ought not be encouraged.

V. NONE OF THE FACTORS FAVORABLE TO GRANTING CERTIORARI IS PRESENT.

This case does not present any of the grounds for granting certiorari listed in Supreme Court Rule 10.1.

There is no conflict in the circuits over any of the issues petitioners seek to raise. There is a general consensus of

the circuits that the refusal ofa judge to disqualify himself is interlocutory and not reviewable by appeal. Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); Green v. Murphy, 259 F.2d 591 (3d Cir. 1958); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964), cert. denied, 377 U.S. 952 (1964); In re Corrugated Container Antitrust Litigation, 614 F.2d 234 (6th Cir. 1956); United States v. Washington, 573 F.2d 1121 (9th Cir. 1978).

This Court has already squarely held that an order of a trial court disqualifying counsel is not appealable. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). A decision refusing to remove a bankruptcy trustee would appear to be similarly interlocutory.

Efforts by a trial court to compel a party to produce evidence are not immediately reviewable unless enforced by crimi-

nal contempt. Doyle v. London Guarantee & Accident Co., 204 U.S. 599 (1907). Thus, the Bankruptcy Court's order in this case requiring the petitioners to file schedules of their assets and personal liabilities was not appealable.

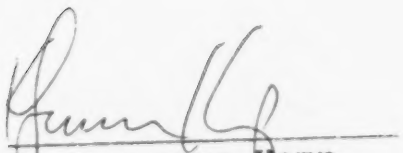
Nor does there appear to be any split of authority as to whether a court has the power to dismiss an appeal for appellant's failure to file a brief within the time period permitted. CA 1 Rule 45; CA 3 Rule 28 (2)(b); CA 4 Rule 45; Latham v. Crofters, Inc., 492 F.2d 913 (4th Cir. 1974); Hickman Garment Co. v. NLRB, 497 F.2d 1339 (6th Cir. 1974); CA 7 Rules 26, 31 (c); Stotler & Co. v. Able, 837 F.2d 1425 (7th Cir. 1988). Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713 (9th Cir. 1989); CA FC Rule 31 (d); HBZ Communications, Inc., v. FCC, 825 F.2d 516 (DC Cir. 1987).

Petitioners do not allege that the three courts below have decided a federal question in a way in conflict with a state court of last resort or with applicable decision of this Court. Nor have they been able to articulate what important question of federal law has not been but should be decided by this Court.

If there has been a departure far from the accepted and usual course of judicial proceedings, it is the conduct of petitioners not the courts. It is the petitioners who have taken three meritless appeals from interlocutory decisions without seeking leave to appeal and then failing to file briefs on any of them then failing to take a timely appeal on one of them. They complain that the Court of Appeals did not warn them that the appeals might be dismissed for lack of appellate jurisdiction yet this is a matter about

which every appeallant must initially be concerned. The Third Circuit's Rule 21 (A)(1) requires every brief to contain a statement of the subject matter jurisdiction of that court including a certification that the appeal is from a final judgment or that the District Court has granted interlocutory appeal.

Respectfully submitted,



K. Lawrence Kemp

CERTIFICATE OF SERVICE

I, K. Lawrence Kemp, hereby certify that on April 17, 1992, I sent 3 true and correct copies of the Brief in Opposition to Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Third Circuit by first class United States Mail, postage prepaid, addressed as follows:

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